

1
2 JAY D. HANSON, ESQ.
3 GRAY, CARY, AMES & FRYE
3 2100 UNION BANK BUILDING
3 SAN DIEGO, CALIFORNIA 92101

4 (714) 236-1661

5 ATTORNEYS FOR DEFENDANT

6
7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SAN DIEGO

10 McCREGOR SEA & AIR SERVICES)
10 (AMERICA) INC., A Delaware) CASE NO. 491479
11 Corporation,)
11 Plaintiff,) POINTS AND AUTHORITIES IN
12) SUPPORT OF APPLICATION TO
12 vs.) SET ASIDE RIGHT TO ATTACH
13) ORDER, QUASH WRIT OF ATTACHMENT,
13 CINEMATRONICS, INCORPORATED, A) AND RELEASE ATTACHED PROPERTY
14 California Corporation,)
14 Defendant.)
15)
16)
17)

1

18 PRELIMINARY STATEMENT

19 This Court has apparently been seriously misled
20 into the issuance of an ex parte writ of attachment, without
21 notice to the defendant, where the result may be to destroy
22 the goodwill and operations of an extremely valuable business.
23 Plaintiff, a supplier, is clearly aware that it has no current
24 claim against defendant having entered into a novation for
25 valuable consideration, yet has apparently failed to advise
26 the Court of this fact. Furthermore, even if one assumed
27 arguendo that plaintiff had a valid, current and existing
28 claim, plaintiff has sought to attach all the property of

1 an extremely valuable business, rather than limiting its
2 attachment to those properties which would perfectly secure
3 its claim. The result is a serious abuse of the attachment
4 procedure which should be corrected by this Court immediately
5 before irreparable harm is done to the defendant's business.

6

7 THE WRIT SHOULD BE QUASHED BECAUSE PLAINTIFF'S
8 CLAIM IS UNMERITORIOUS.

9 In this case there has been a written novation
10 of the contract, which is the subject of plaintiff's suit.
11 The novation is clearly set out in the attachments to the
12 declaration of Mr. Pierce attached hereto. Novations
13 extinguish the original obligation and substitute a new
14 obligation, in this case an obligation to make another
15 payment after six months. See, e.g., Civil Code 1530, 1532,
16 Beckwith v. Sheldon, 165 C. 319 (1913). A novation need
17 not be written even if the original contract was in writing.
18 Producers Fruit Co. v. Goddard, C.A. 737 (1925). However,
19 in this case, the novation clearly is in writing. Furthermore,
20 whereas consideration is required for a novation, the
21 consideration may simply be the release of the old obligation.
22 Manfre v. Sharp, 210 C. 479 (1930). As proven in the declaration
23 of Mr. Pierce the novation here is supported by the consideration
24 of an immediate payment of \$10,000.00, receipt of which
25 has been acknowledged by the plaintiff.

26

27

28

1
2
3 Under the circumstances, plaintiff clearly has
4 no current claim for the balance on its account with defendant.
5 Its claim is premature, and the application for writ of attachment
6 should be denied.

7 **III**

8 ASSUMING ARGUENDO THE VALIDITY OF PLAINTIFF'S
9 CLAIM, ITS ATTACHMENT IS EXCESSIVE.

10 In this case, plaintiff has purported to attach
11 all the assets of a substantial business rather than limiting
12 its attachment to the amount of its claim. Thus, even if
13 the Court were to find that plaintiff's claim is right, which
14 we vigorously deny, the attachment is greatly excessive to
15 the prejudice of defendant. The attachment should be limited
16 to an amount which will secure plaintiff's claim and not
17 be extended to an amount which will damage the ongoing business
18 of the defendant.

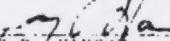
19 **IV**

20 CONCLUSION

21 For the reasons set forth above, the order granting
22 writ of attachment in this case should be set aside, the
23 writ quashed, and the attachment levy released.

24 DATED: September 8, 1982.

25 GRAY, CARY, AMES & FRYE

26 BY: 
27 JAY D. HANSON
ATTORNEYS FOR DEFENDANT

28